D. Arbitration Bodies

1. International vs Domestic Arbitration

Discussions of the jurisdiction and procedures for arbitration in the Russian Federation are somewhat complicated by the fact that the existing legislation on arbitration consists of several different, and not entirely consistent, legal acts relating to "international" arbitration and to arbitration generally. These acts include (1) the Statute on the Arbitration Court which appears as Appendix No. 3 to the Civil Procedure Code, providing very general rules concerning arbitration of civil disputes subject to the jurisdiction of the general courts, (2) the Temporary Statute on Arbitration Tribunals for the Resolution of Economic Disputes ("the Temporary Statute"), passed in 1992 to govern arbitration of disputes subject to the jurisdiction of the arbitrazh courts, and (3) the Law on International Commercial Arbitration, passed in 1993 to govern international

commercial arbitration, primarily at the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC).

At the time that the acts listed were adopted, there was little or no overlap in their coverage. Arbitration for international commercial disputes and for maritime disputes had been available for decades, but exclusively at the ICAC and MAC, each of which had its own statute and rules. The Temporary Statute on Arbitration Tribunals for the Resolution of Economic Disputes applies by its terms only to the arbitration of disputes subject to arbitrazh court jurisdiction, and at the time of passage of the Temporary Statute the arbitrazh courts had no general jurisdiction over international disputes. The Temporary Statute specifically exempts from its coverage the two international arbitration tribunals which were in existence at the time of its passage - the ICAC and the MAC — so there was no overlap in the application of the rules. Likewise, since the Temporary Statute applies only to disputes otherwise subject to the jurisdiction of the arbitrazh courts and Appendix 3 to the Civil Procedure Code can apply only to those which would otherwise be subject to the general courts, there was little or no overlap in the application of the two provisions to domestic disputes. In 1993, the Law "On International Commercial Arbitration" was passed. This law was intended to bring legislation on international arbitration into line with Russia's obligations as a signatory to the 1958 New York Convention (by way of legal successorship to the USSR). The terms of the law apply only to international commercial arbitration, and the statute on the ICAC is an appendix to the Law. The 1993 Law does not apply to "domestic" arbitration at all.

The rules envisioned in the three documents, although similar in some respects, are not identical. This is particularly true with respect to the rules concerning the execution of arbitral awards, including the limitations period for presentation of the award for execution and the jurisdiction of the courts in issuing the corresponding execution order. There are, however, other differences as well, including differences in the dispositive and imperative nature of the rules which must be observed by arbitration tribunals — a matter of significance as violation of the imperative rules may result in reversal of an award by the courts.

Between the passage of the listed acts and the present, the general jurisdictions of the different courts have changed and the number of existing arbitration tribunals has grown precipitously. As was mentioned in Chapter 1, one recent study found 250 arbitration tribunals of different types. While many of these tribunals, by their founding rules, accept only "domestic" disputes, some have statutes authorizing them to accept international commercial disputes for resolution as well. These include several tribunals accepting commercial disputes generally, such as those under the Union of Jurists and the Moscow [City] Chamber of Commerce and Industry, and also some that were formed to arbitrate particular types of disputes, such as the facilities established by the Moscow Interbank Currency Exchange and the national Association of Stock Exchanges. These developments have significantly complicated the application of the various laws and statutes.

The Temporary Statute, by its terms, applies to cases that would otherwise be subject to the jurisdiction of the arbitrazh courts. Since the passage of the 1995 Arbitrazh

Procedure Code, the simple presence of a foreign party or an enterprise with international investment does not remove disputes from the jurisdiction of the arbitrazh courts, if the disputes are otherwise subject to them. This would suggest that the Temporary Statute applies to arbitration of those disputes, unless they are being considered by the ICAC or MAC, which are specifically exempted by the Temporary Statute. However, the Temporary Statute itself also provides that it will apply to international disputes only by agreement of the parties. Thus, an international dispute otherwise subject to arbitrazh court jurisdiction, but in which the parties have not specifically agreed to the application of the Temporary Statute, might have to be governed by the 1993 Law. A dispute with a foreign element in which some individuals participate as parties would be subject to the jurisdiction of the general courts, not the arbitrazh courts, and so arbitration of such a dispute would seem to fall within the provisions of Appendix 3 to the Civil Procedure Code. But this Appendix is not entirely consistent with the 1993 Law or with Russia's treaty obligations under the New York Convention, and therefore the 1993 Law probably takes precedence on those issues when there are international parties participating. The differences in rules for execution of awards and general rules for procedure among the different laws will mean that an arbitration tribunal which accepts all kinds of commercial disputes must have several sets of rules, to be applied depending upon the nature of the parties.

The inconsistencies in the rules are likely to create increasing difficulties over time. As foreign investment in Russian companies expands through such means as stock ownership, the existence of "international investments" in a company may be increasingly difficult to determine by any simple means. Moreover, the term "international investments" itself may become less than clear. Does international financing qualify a company as one with "international investments"? What about stock holding through a domestic nominee? Since the presence of "international investments" is what determines which law applies regarding arbitration, the answers to these questions would be significant. One option in the interim would be for parties arbitrating before a general arbitration tribunal to be required to declare themselves as "international" at the outset or be subject to the "domestic" rules, or for tribunals to be required to make a finding in this regard in each case. A more desirable solution would eliminate the confusion surrounding the various statutes and bring the domestic and foreign rules closer together.

In February of 1998, a draft law "On Arbitration in the Russian Federation," passed its first reading in the lower house of the Russian Parliament. The draft law applies to the formation and activities of all arbitration tribunals located on the territory of the Russian Federation, eliminating the need to determine what rules apply on the basis of the court that the dispute would otherwise be heard in, and the confusing effects of changes in court jurisdictions. In providing a single set of rules for the formation of a panel of arbitrators and of imperative and default rules for procedures, the new law would eliminate problems presented by differences between Appendix 3 and the Temporary Statute. By its terms, however, the draft law does not apply to "international commercial arbitration," which would continue to be governed by the 1993 Law "On International Commercial Arbitration." Thus, arbitration facilities which accept both domestic and international disputes would continue to need to be attentive to differences between the

two pieces of legislation, and the problem of identification of the "international" status of a dispute would remain.

2. Jurisdiction of Arbitration Tribunals

The general rule concerning the competence of arbitration tribunals is that civil law disputes that are otherwise within the jurisdiction of either the arbitrazh courts or the courts of general jurisdiction may be transferred to an arbitration tribunal by agreement of the parties. Disputes which do not qualify as "civil-law" disputes are not subject to resolution by arbitration. This would include administrative disputes (e.g. those concerning the actions of a state body), disputes concerning the establishment of a fact having legal significance, and any other dispute or matter which is not subject to resolution by the will of the parties and requires that a competent body apply a legal rule or standard. Within the category of civil-law disputes, the general exceptions to arbitrability are (1) those disputes that are assigned by legislation to the exclusive competence of a court or other body; and (2) those disputes concerning which legislation specifically prohibits arbitration.

With respect to international commercial disputes, the 1993 Law "On International Commercial Arbitration" defines the general limits of jurisdiction of arbitration bodies over such cases. That law defines the sphere of international arbitration as including two broad types of cases:

(1) cases concerning contractual or other civil-law disputes arising out of foreign trade, where the place of business of one of the parties is located outside the Russian Federation; and

(2) cases in which an enterprise with foreign investments, international organization, or international association operating on the territory of the Russian Federation has a dispute with another such entity or with a domestic entity, and also cases concerning disputes among the founders of such enterprises, organizations or associations.

Further definition of the jurisdiction of individual arbitration tribunals is dependent upon the founding documents, charter or statute, and rules of each particular tribunal. Presentation of the specific rules of all of the arbitration tribunals which are authorized to resolve international disputes is beyond the scope of this Handbook.

By far the most commonly used arbitration tribunal for international commercial disputes is the International Commercial Arbitration Court under the Chamber of Commerce and Industry of the Russian Federation (the "ICAC"). The ICAC's Statute and rules were based on the UNCITRAL model rules and are consistent with those rules and with practices of international commercial arbitration tribunals in other countries. In defining its own jurisdiction, the ICAC's Statute repeats the two elements of the 1993 Law's definition of the sphere of international commercial arbitration which are given above. The ICAC's Rules,[6] in discussing its jurisdiction, expand upon this definition by

listing the following examples of civil law relationships which may give rise to disputes subject to ICAC arbitration:

- ➢ the purchase and sale (delivery) of goods;
- ➢ the performance of works or rendering of services;
- ➢ the exchange of goods and/or services;
- ➢ the carriage of goods and passengers;
- ➢ commercial representation and intermediary services;
- ➢ rental (lease);
- ➢ scientific and technical exchanges and the exchange of other results of creative activities;
- ➢ construction of industrial and other objects;
- ➢ licensing operations;
- ➢ credit and settlement operations;
- ➢ insurance;
- ➢ joint entrepreneurship;
- ➢ other forms of industrial and entrepreneurial cooperation.

The jurisdiction of the ICAC concerns all civil law relationships arising out of these activities and is not limited to disputes related to the contracts which establish them. Thus, the ICAC could have jurisdiction over a case concerning compensation for harm caused (tort) between parties subject to its jurisdiction, even if the events involved were not envisioned by a contract between the parties. For the ICAC to have such jurisdiction, however, the arbitration agreement between the parties would have to be sufficiently broad that it would cover all disputes between the parties, or the parties would need to agree to arbitrate the specific dispute before the ICAC.

3. Requirement of Agreement

***The submission of a dispute to an arbitration tribun*al always requires an agreement between the parties, and the relevant agreement must be in writing.** The agreement may cover a specific dispute, disputes concerning a specified subject matter, or all disputes between the parties which are subject to arbitration. Multi-party agreements concerning arbitration may be concluded. Whatever the scope of the agreement, however, it is important that it be clear. Russian courts have reversed/refused to execute arbitration awards where the language of the agreement could be construed not to require arbitration.

An agreement on arbitration may be in a contract or written separately. Arbitration provisions of contracts retain force regardless of the validity of the contract. Where the matter is governed by the Law "On International Commercial Arbitration," an agreement to arbitrate may also be concluded by means of the exchange of a filing of claim in which the petitioner states the existence of an agreement and a substantive answer to the claim

[6] A full English translation of the ICAC's Rules of Procedure can be found in 22 Review of Central and East European Law 33-53 (1996) (translation by William B. Simons and Curtis Vaughn-Kirov).

in which the existence of the agreement is not disputed. For matters governed by the 1993 Law, an agreement to arbitrate may also be concluded by reference in a contract to another document in which the arbitration agreement is stated. These means of concluding an agreement to arbitrate are not recognized by the Temporary Statute and so may not be applied in "domestic" cases.

The rules concerning recognition of an arbitration agreement vary between the arbitrazh courts and the courts of general jurisdiction. For those cases that would otherwise be subject to consideration by the arbitrazh courts (most commercial cases), a party wishing to enforce an arbitration agreement must petition the court concerning the matter by the time of its first submission on the substance of the case.[7] The existence of a valid arbitration agreement will not serve as grounds for reversal of an arbitrazh court decision unless the objection to the court's jurisdiction was made in the proper time. According to Articles 129 and 219 of the Civil Procedure Code, however, the courts of general jurisdiction may not consider a case where a valid arbitration agreement between the parties exists. This general statement deprives the court of jurisdiction, and will allow the reversal of an issued decision on the grounds that the dispute should have been resolved by the corresponding arbitration tribunal.

4. Procedure for Submission of a Dispute

The form and procedure for submission of a dispute to an arbitration tribunal is defined by the rules of the particular tribunal. A review of the rules of submission for all of the arbitration tribunals to which a commercial dispute could be submitted is beyond the scope of this Handbook. Referring to the ICAC, the most common forum for international commercial arbitration in the Russian Federation, the rules of procedure are quite consistent with international practice and were based on the UNCITRAL model rules. The newly formed St. Petersburg International Commercial Arbitration Court has adopted the UNCITRAL model rules as its rules for procedure. Tribunals that accept both domestic and international disputes, and particularly those designed for the resolution of only particular types of disputes, have differing procedural rules, depending upon their purposes and the legislative acts that served as the model for their drafters.

5. Execution and Appeals of Arbitral Awards

In general, arbitral awards are to be executed voluntarily by the parties within the time period specified in the award. ***If an award is not honored by the party required to do so, mandatory execution of the award may be sought through an execution order issued by a Russian court or arbitrazh court.*** This execution order is then submitted to the court enforcer (the bailiff service) for enforcement of the award through the same procedures used for any court judgment. Periods of limitation for the presentation of an execution order for enforcement vary depending upon whether the order concerns an international or a domestic arbitral award. These issues are discussed in detail in Chapter 5.

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[7] This rule is found in Article 87 of the Arbitrazh Procedure Code. See also Chapter 3 of this Handbook concerning procedures in the arbitrazh courts in the first instance.

Arbitral awards are final, and are not subject to appeal on grounds of error in the evaluation of the facts or the application of the law. In general, mandatory enforcement of an arbitral award may be refused by the court from which it is requested if:

(1) there was not a valid arbitration agreement or a party was without capacity;
(2) if the party objecting could not participate due to improper notice of the proceedings;
(3) if the composition or procedures of the arbitration tribunal were not those agreed by the parties;
(4) if the dispute was not subject to arbitration under Russian law; or
(5) if the award violates the public policy of the Russian Federation.

Although similar, the formulation of the rules applying to refusal of enforcement of arbitral awards varies somewhat between those issued in domestic and in international matters, and between international matters resolved by a Russian arbitration tribunal and those resolved by a tribunal outside Russia. They are discussed in more detail in Chapter 5.